Supreme Court, U.S.
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No. 84-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL P. SWAIDA, JR.,
Petitioner,

v.

IBM RETIREMENT PLAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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August 1984

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QUESTION PRESENTED

Whether use by the IBM Retirement Plan, in conformity with regulations of the United States Department of the Treasury, of the "elapsed time method" to measure petitioner's length of service for determining whether he has earned a vested right to a pension is consistent with the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) ("ERISA").

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

1. The IBM Retirement Plan

International Business Machines Corporation ("IBM") sponsors the IBM Retirement Plan (the "Plan"). The Plan provides that a regular employee who completes ten or more years of service at IBM is entitled to a pension at age 65. Such an employee's right to a pension is "vested"—that is, not subject to forfeiture even if he leaves or loses his job prior to retirement. A 13a-15a; 570 F. Supp. at 483.[1]

[1] The District Court's opinion is reported at 570 F. Supp. 482 (S.D.N.Y. 1983). The opinion of the Second Circuit is reported at 728 F.2d 159 (1984).

In conformity with regulations approved by the Departments of Labor and the Treasury, the Plan uses the "elapsed time method" to measure an employee's length of service for vesting purposes. Under this method, an IBM employee receives full credit towards vesting for the time "elapsed" between his or her dates of hire and permanent termination, including time not worked due to holidays, sickness, vacations and leaves of absence, and interruptions in service that do not exceed one year in length. A 14a; 570 F. Supp. at 483.

On March 6, 1978, the Internal Revenue Service issued a favorable determination letter with respect to the Plan. A 15a; 570 F. Supp. at 484.[2]

2. Petitioner's Employment at IBM

Petitioner was employed by IBM on a full-time basis from June 20, 1966 to April 9, 1976, a period of nine years, nine months, and 21 days. A 16a; 570 F. Supp. at 484. Petitioner alleges and respondents do not dispute that he worked in excess of 1,000 hours during the period June 20, 1975 to April 9, 1976.[3]

Shortly after leaving IBM, petitioner requested that IBM provide him with a certificate evidencing that he had a vested right to a pension. In response, IBM officials advised petitioner that, because he had not completed the ten years of service required by the Plan, his request could not be honored. A 16a-

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[2] Pension plans meeting the requirements contained in the Internal Revenue Code qualify for favorable tax treatment. Upon request, the Internal Revenue Service will issue a determination letter indicating whether a new or amended pension plan qualifies for favorable tax treatment. Treas. Reg. § 601.201(a)(3), (o) (1984); Rev. Proc. 80-30, 1980-1 C.B. 685, *ampf'd*, Rev. Proc. 81-12, 1981-1 C.B. 652, *and modified*, Rev. Proc. 81-19, 1981-1 C.B. 689. Among the requirements that a plan must meet in order to qualify for favorable tax treatment are ERISA's vesting requirements. 26 U.S.C. § 411 (1982).

[3] As a professional employee, petitioner was exempt from the Fair Labor Standards Act's minimum wage and maximum hour provisions. *See* 29 U.S.C. § 213(a)(1) (1982). As a result, IBM was not required to maintain a record of the hours petitioner worked (*see* 29 C.F.R. § 516.3 (1983)) and did not do so. A 16a; 570 F. Supp. at 484.

17a; 570 F. Supp. at 484. Petitioner thereupon commenced this litigation.

3. The Vesting Provisions of ERISA

ERISA establishes minimum vesting requirements for all covered pension plans. ERISA § 203, 29 U.S.C. § 1053, and ERISA § 1012, 26 U.S.C. § 411. Section 203(a)(2) outlines three alternative schedules that a pension plan may use to satisfy ERISA's vesting requirements. At all times pertinent to this action, the Plan has used "10-year cliff" vesting, the schedule set out in Section 203(a)(2)(A):

> A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

The question in this case is how the term "year of service" is to be interpreted in applying the 10-year vesting rule of Section 203(a)(2)(A). Section 203(b)(2)(A), applicable here, defines a "year of service" as:

> . . . a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary [of Labor]) during which the participant has completed 1,000 hours of service.

Section 3002(c) of ERISA, 29 U.S.C. § 1202(c) (1982), provides that regulations prescribed by the Secretary of the Treasury under Section 411 of the Internal Revenue Code shall apply to the minimum vesting standards set forth in Title I of ERISA.[4] In addition, Section 7805(a) of the Internal Revenue Code, 26 U.S.C. § 7805(a) (1982), requires the Secretary to "prescribe all needful rules and regulations for the enforcement of this title." Thus, Code Section 7805(a) authorizes the Secretary of the Treasury to issue regulations interpreting Code

[4] Section 411, 26 U.S.C. § 411, is the Internal Revenue Code counterpart to Section 203 of ERISA. It provides that ERISA's minimum vesting standards must be satisfied by any pension plan claiming tax-qualified status under Section 401 of the Internal Revenue Code. 26 U.S.C. § 401(a)(7) (1982).

Section 411, and ERISA Section 3002(c) makes those regulations applicable to ERISA Section 203. The elapsed time regulations relied upon by the Plan were promulgated by the Secretary of the Treasury pursuant to his authority under Code Section 7805. 45 Fed. Reg. 40,985 (1980).

4. The Elapsed Time Regulations

In July 1976, the Department of Labor announced that its vesting regulations would permit use of the elapsed time method, as well as an hour-counting method and several equivalency methods, to measure length of service for vesting purposes. Labor Department, ERISA Technical Releases 2002, 2003 (June 30, 1976), *reprinted in* Pens. Rep. (BNA), No. 93, R-9 (July 5, 1976). The regulations promulgated by the Secretary of Labor in December 1976, in both temporary and proposed form, did so. 41 Fed. Reg. 56,462, 56,484 (1976) (to be codified at 29 C.F.R. § 2530.200b-9). After responsibility for promulgation of regulations under ERISA's vesting provisions was transferred from the Department of Labor to the Department of the Treasury, the Treasury in 1980 issued the final elapsed time regulations, which are at issue here. T.D. 7703, 1980-2 C.B. 143 (1980) (codified in Treas. Reg. § 1.410(a)-7).

In summary, the elapsed time regulations require a plan:

> (i) . . . to take into account the period of time which elapses while the employee is employed (*i.e.*, while the employment relationship exists) with the employer or employers maintaining the plan, regardless of the actual number of hours he or she completes during such period . . . . [A]n employee's service is required to be taken into account for purposes of . . . vesting as of the date he or she first performs an hour of service within the meaning of 29 CFR § 2530.200b-2(a)(1) for the employer or employers maintaining the plan. Service is required to be taken into account for the period of time from the date the employee first performs such an hour of service until the date he or she severs from service with the employer or employers maintaining the plan.

> (ii) The date the employee severs from service is the earlier of the date the employee quits, is discharged, retires or dies, or the first anniversary of the date the employee is absent from service for any other reason (*e.g.*, disability, vacation, leave of absence, layoff, etc.). . . .

Treas. Reg. § 1.410(a)-7(a)(2) (1983). The regulations also contain extensive requirements that a pension plan must meet in order to use the elapsed time method. In the District Court, petitioner did not allege that the Plan failed to satisfy any of these requirements.

5. Proceedings Before the District Court

On June 1, 1982, petitioner filed a complaint against the respondents in the United States District Court for the Southern District of New York, seeking a judgment: (1) declaring that ERISA prohibits the Plan's use of the elapsed time method in determining whether an employee has earned a vested right to a pension; (2) enjoining respondents from using the elapsed time method in the future; (3) declaring petitioner to be fully vested under the terms of the Plan; (4) directing respondents to pay benefits to petitioner when he becomes eligible to receive them; and (5) directing respondents to grant vesting credit to each member of a purported class allegedly represented by petitioner for any applicable year in which the member completed 1,000 hours of service but was denied credit for a full year of service under the elapsed time method. A 12a-13a; 570 F. Supp. at 483. The case was assigned to the Honorable Edward Weinfeld.

The parties cross-moved for summary judgment, and at the request of the District Court, a brief *amicus curiae* was submitted by the Department of Justice on behalf of the United States. A 23a-24a; 570 F. Supp. at 486. The brief of the United States urged that respondents' motion for summary judgment be granted.

The District Court granted judgment for respondents (570 F. Supp. 482). The Court of Appeals affirmed the District Court's judgment for the reasons stated in Judge Weinfeld's opinion (728 F.2d 159) (*per curiam*). A petition for rehearing

was denied, and no judge requested that a vote be taken on petitioner's suggestion for rehearing in banc.

6. The District Court's Opinion

In granting respondents' motion for summary judgment, Judge Weinfeld found that although a strict reading of isolated excerpts from Section 203(b)(2)(A) of ERISA gave "surface support" to petitioner's position, the statutory language could not be read in isolation from the overall purposes of Congress in enacting ERISA. The District Court reasoned that since the 1,000-hour rule lacked a clearly defined purpose bearing on the issue presented, the statute should be applied in a way that furthered the broad purposes of Congress: to establish minimum standards for pension plans without imposing an administratively burdensome regulatory scheme that would discourage the creation and continued funding of pension plans. A 24a-27a; 570 F. Supp. at 486-88.

Judge Weinfeld determined that by limiting required recordkeeping costs and by protecting employees temporarily severed from their jobs, the elapsed time regulations advanced the congressional objective of ensuring maximum distribution of pension benefits. The District Court also found that: (a) in enacting ERISA, Congress recognized its objectives "would require a complex balancing of interests that in many instances would best be resolved in an administrative setting;" (b) Congress had granted substantial enforcement responsibilities to the Secretaries of Labor and the Treasury; (c) the Secretary of Labor was authorized to issue regulations defining technical terms under the Act; and (d) the Secretary of the Treasury was empowered to clarify the term "year of service" and to issue regulations governing ERISA's vesting provisions. A 28a-29a; 570 F. Supp. at 488-89. As a result, the District Court concluded, the provisions of ERISA:

> . . . leave no room to doubt that Congress delegated to the Treasury Department authority to determine the method for computing an employee's service for purposes of his vested right to a pension and that the Secretary acted within the scope of his authority in authorizing the use of the elapsed time method.

> There is no basis for any contention that the regulations either exceeded delegated authority or that they were arbitrary or capricious.

A 29a-30a; 570 F. Supp. at 489.

Judge Weinfeld also found that prior to the enactment of ERISA, the elapsed time method was well known and was virtually the universal method (outside of multi-employer plans) used to measure service for vesting purposes. Since Congress was well aware of the use of the elapsed time method, the District Court concluded that if Congress had intended to preclude continued use of that method in the future, it would have done so explicitly. A 31a-32a; 570 F. Supp. at 489. Accordingly, the District Court held that the regulations were within the competence of the Treasury Department to clarify the term "year of service" and the product of a proper exercise of delegated authority, and that having structured the Plan in conformity with the elapsed time regulations, IBM acted justifiably in denying petitioner's claim to a vested pension. A 32a-33a; 570 F. Supp. at 490.

REASONS FOR DENYING THE WRIT

Petitioner's case for certiorari rests on his assertions that the validity of the elapsed time method is a subject of uncertainty requiring immediate clarification by this Court, and that resolution of the issue raised by the petition will affect hundreds of thousands of pension plan participants. Pet. at 7, 22. In fact, there is no such uncertainty. Use of the elapsed time method in conformity with the regulations has been widespread since 1976, and the decision below does not conflict with any other court decision. In addition, petitioner's claim depends upon the timing of his own decision to leave IBM employment. Thus this case does not present a question of general importance.

1. Use of the elapsed time method is explicitly authorized by regulations which have been in place since 1976. Since that time, the regulations have been relied upon by thousands of

pension plans. Today the elapsed time method is the most common method of measuring an employee's length of service for pension vesting purposes. JA 170a, ¶ 8.[5] The widespread use of the elapsed time method is a strong indication that, contrary to petitioner's assertion, there are no general doubts as to the validity of the elapsed time regulations under ERISA.

2. Petitioner states that this is a case of first impression in any court (Pet. at 7) and, so far as counsel is aware, this is the only action ever to have directly challenged the validity of the elapsed time method.[6] The absence of litigation concerning the validity of the elapsed time regulations is further confirmation that there is not the uncertainty petitioner suggests. In addition, the thorough and thoughtful decision of Judge Weinfeld, adopted by the Court of Appeals *per curiam*, should lay to rest any questions about the validity of the elapsed time regulations raised by the pendency of petitioner's own suit.

3. Although petitioner asserts that resolution of the question he raises will affect "hundreds of thousands of employees" (Pet. at 7), the reality is that petitioner's claim turns on the peculiarities of his own work history at IBM—specifically, on the fact that he chose to leave his job in the year before his pension rights would otherwise have vested, with more than 1000 hours of service but less than a full year of employment. Another employee in petitioner's situation could easily avoid petitioner's present difficulty by delaying his resignation for the time required to achieve vesting—which in petitioner's case was

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[5] References to "JA" denote pages in the Joint Appendix filed in the Court of Appeals.

[6] Somewhat inconsistently, petitioner appears to rely on Automated Packaging Systems, Inc. v. Comm'r, 70 T.C. 214 (1978), to suggest that the Tax Court has disapproved the elapsed time regulations. Pet. at 18-20. In fact, the Tax Court expressed no concern about the validity of the elapsed time regulations in general and upheld the authority of the Secretary of Labor to promulgate them. 70 T.C. at 222-24. It explicitly declined to pass on the issue presented here. *Id.* at 224 n.11. Recently, in Standard Oil Co. v. Comm'r, 78 T.C. 541 (1982), the Tax Court made extensive reference to the elapsed time regulations without any suggestion that they might be invalid.

only two months and 10 days.[7] In addition, for the many employees who work for an employer for more than ten full years or for less than nine years and 1000 hours, the issue raised by petitioner has no practical significance.

4. Nor is it clear that petitioner would prevail even if his own interpretation of ERISA were correct. Petitioner's claim is based largely on his assumption that the 12-consecutive-month period (referred to in ERISA Section 203(b)(2)(A)) during which his hours of service would be counted would be his personal year of employment—that is, the 12-consecutive-month period beginning on June 20 and ending the following June 19. However, although use of the personal year of employment is required by the elapsed time regulations, Treas. Reg. § 1.410(a)-7(a)(2)(i) (1984), there is no similar requirement with respect to the hour-counting approach. *See* 29 C.F.R. § 2530.203-2(a) (1983). Thus, for example, had the Plan adopted the hour-counting approach and designated the 12-consecutive-month period beginning on November 1 and ending on the following October 31 for purposes of measuring length of service, petitioner would not have had 1,000 hours of service in ten separate 12-consecutive-month periods, and would not be vested even under his own interpretation of ERISA.[8]

5. Finally, even if it is assumed that petitioner would be better off under an hour-counting approach, many other em-

[7] Petitioner left IBM service voluntarily. There was no allegation below that petitioner was unaware of the Plan's ten-year requirement for vesting when he resigned, nor any allegation that IBM caused petitioner to resign in order to prevent his pension rights from becoming vested. Any such action by an employer would be unlawful and actionable by the employee. ERISA § 510, 29 U.S.C. § 1140 (1982).

[8] This conclusion is based on the following calculations:

Petitioner's Dates of Employment	Number of Hours Worked (assumes 40-hour work week)	Years of Service
6/20/66-10/31/66	40 x 19 = 760	0
11/1/66-10/31/75	full time	9
11/1/75-4/9/76	40 x 23 = 920	0
	Total	9

ployees would not be; they would be vested under the elapsed time method but not the 1,000-hours approach. The indisputable fact is that, depending on the specifics of their employment histories, some employees would be better off under the hour-counting approach, while others would be better off under elapsed time. Whenever there is a system based on a minimum period of employment, some employees will fall just short of the minimum. That is inherent in 10-year cliff vesting, a vesting schedule Congress specifically endorsed, and it is not the result of the particular method used to determine whether an employee has completed ten years of service.

CONCLUSION

No issue is presented that warrants review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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